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UNITED STATES DISTRICT COURT
CENTRAL DISTRICT OF CALIFORNIA
EASTERN DIVISION

KATRINA MULHOLLAND,) Case No. EDCV 08-00823-MLG
Petitioner,)
v.) MEMORANDUM OPINION AND ORDER
TINA HORNBECK, Warden,)
Respondent.)
)

I. Facts and Procedural History

This is a pro se petition for writ of habeas corpus filed by a state prisoner under 28 U.S.C. § 2254.¹ The pleadings show that on July 21, 2006, following a negotiated guilty plea, Petitioner was convicted in the San Bernardino County Superior Court of voluntary manslaughter and kidnapping, with an enhancement for knowing that a principal was personally armed with a firearm, in violation of California Penal Code §§ 192(a), 207(a) and 12022(d). On August 18, 2006, Petitioner was sentenced to a term of 12 years in prison, in accordance with the terms of the plea agreement.

¹ The parties have consented to this Court's exercise of civil jurisdiction pursuant to 28 U.S.C. § 636(c).

Petitioner did not seek direct review of the conviction and sentence. However, on May 17, 2007, Petitioner constructively filed a motion for modification of sentence in the San Bernardino County Superior Court.² Petitioner alleged that her sentence to the upper term of 11 years on the manslaughter conviction, without submission of the aggravating factors to a jury, was unconstitutional under the recent United States Supreme Court decision in *Cunningham v. California*, 549 U.S. 270 (2007).³ The superior court denied the motion on May 29, 2007.

On August 27, 2007, Petitioner filed a petition for writ of habeas corpus in the San Bernardino County Superior Court. (Lodgment 5.) The petition was denied on September 19, 2007. (Lodgment 6.) On September 30, 2007, Petitioner filed a habeas corpus petition in the California Court of Appeal, which the court denied on November 15, 2007. (Lodgments 7, 8.) Petitioner then filed a habeas corpus petition in the California Supreme Court on November 25, 2007, which the court denied on February 28, 2008. (Lodgments 9, 10.) All of these petitions challenged the imposition of the upper term sentence based on the *Cunningham* decision.

It appears that on March 19, 2008, Petitioner filed a document

² Under the "mailbox rule" of *Houston v. Lack*, 487 U.S. 266, 276 (1988), a *pro se* prisoner's habeas corpus petitions are deemed filed when they are delivered to prison officials for mailing. For purposes of this opinion, the Court will deem the date that Petitioner signed all petitions and motions as their filing date. See also *Stillman v. LaMarque*, 319 F.3d 1199, 1201 (9th Cir. 2003).

³ There, the Supreme Court held that the imposition of an upper term sentence under California's three-tier sentencing scheme violated the defendant's Sixth and Fourteenth Amendment right to a jury trial because it "assigns to the trial judge, not the jury, authority to find facts that expose a defendant to an elevated 'upper term' sentence." *Id.* at 871.

1 entitled "Motion to Toll Time for Writ of Habeas Corpus" with this
2 Court. Court records indicate that a deputy clerk construed the
3 motion as one relating to a pending case and returned the document
4 to Petitioner without filing, because it did not have a valid case
5 number. Petitioner did not follow up with this filing. Instead, on
6 April 28, 2008, she filed a petition for writ of *certiorari* in the
7 United States Supreme Court, which the Supreme Court denied on
8 October 6, 2008. *Mulholland v. California*, No. 07-11135, 2008 WL
9 2227352 (S. Ct. Oct. 8, 2008).

10 Meanwhile, on June 14, 2008, Petitioner filed a second "Motion
11 to Toll Time for Writ of Habeas Corpus" with this Court. This time,
12 the motion was given a case number, assigned to a district judge, and
13 referred to this Court. On June 23, 2008, the Court dismissed the
14 motion to toll time, finding that there was no subject matter
15 jurisdiction to consider such a motion. Construing the petition as
16 one seeking a writ of habeas corpus, the Court found that it was
17 insufficient as a matter of law as there was no statement of the
18 underlying conviction, no information concerning the state appellate
19 history, and no allegation of the underlying facts or claims for
20 relief. Petitioner was granted leave to file a petition for writ of
21 habeas corpus correcting these deficiencies.

22 On July 29, 2008, Petitioner filed the current petition for writ
23 of habeas corpus. Petitioner continues to claim that the trial court
24 erred in sentencing her to the upper term sentence without a jury
25 finding the aggravating factors to support such a sentence. On August
26 29, 2008, Respondent filed a motion to dismiss the petition, arguing
27 that it is untimely. On September 22, 2008, Petitioner filed a
28 "Motion to Grant Petition for Writ of Habeas Corpus," in which she

1 opposes the motion to dismiss.

2 In her opposition briefing, Petitioner contends that she is
 3 entitled to equitable tolling of the statute of limitations because
 4 1) she was unable to access the law library during her first 60 days
 5 in prison custody; 2) the conditions in California prisons are
 6 crowded; and 3) she is not well educated in legal matters. Petitioner
 7 further claims that she is entitled to a period of statutory tolling
 8 that would render this petition timely. The matter is ready for
 9 decision.

10

11 **II. Analysis**

12 The Antiterrorism and Effective Death Penalty Act of 1996
 13 ("AEDPA"), 28 U.S.C. § 2244(d)(1),⁴ was enacted on April 24, 1996,
 14 and applies to all federal habeas corpus petitions filed after that
 15 date. *Lindh v. Murphy*, 521 U.S. 320, 326-27 (1997); *Patterson v.*
 16 *Stewart*, 251 F.3d 1243, 1245 (9th Cir. 2001). AEDPA amended 28 U.S.C.
 17 § 2244 to impose a one-year statute of limitations on federal habeas
 18 petitions by persons in custody pursuant to state court judgments.
 19 See *Patterson*, 251 F.3d at 1245; *Tillema v. Long*, 253 F.3d 494, 498
 20 (9th Cir. 2001). The one-year limitations period ordinarily runs from

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22 ⁴ 28 U.S.C. § 2244(d)(1) states: "A 1-year period of limitation
 23 shall apply to an application for a writ of habeas corpus by a person
 24 in custody pursuant to the judgment of a State court. The limitation
 25 period shall run from the latest of - (A) the date on which the
 26 judgment became final by the conclusion of direct review or the
 27 expiration of the time for seeking such review; (B) the date on which
 28 the impediment to filing an application created by State action in
 violation of the Constitution or laws of the United States is removed,
 if the applicant was prevented from filing by such State action; (C)
 the date on which the constitutional right asserted was initially
 recognized by the Supreme Court and made retroactively applicable to
 cases on collateral review; or (D) the date on which the factual
 predicate of the claim or claims presented could have been discovered
 through the exercise of due diligence."

1 "the date on which the judgment became final by the conclusion of
 2 direct review or the expiration of the time for seeking such review."
 3 28 U.S.C. § 2244(d)(1)(A); see *Smith v. Duncan*, 297 F.3d 809, 812-13
 4 (9th Cir. 2002), abrogation on other grounds recognized by *Moreno v.*
 5 *Harrison*, 245 Fed. Appx. 606 (9th Cir. 2007). In California, the time
 6 for seeking direct review expires sixty days after the date of
 7 judgment. Cal. R. Ct. 8.308(a).

8 Because Petitioner did not seek direct review of her conviction,
 9 the limitations period began to run on October 17, 2006, 60 days
 10 after Petitioner was sentenced. Accordingly, Petitioner had until
 11 October 17, 2007, in which to timely file a petition for writ of
 12 habeas corpus. See *Patterson*, 251 F.3d at 1245. This petition was not
 13 filed until July 29, 2008. Absent some basis for statutory or
 14 equitable tolling of the limitations period, the petition is clearly
 15 untimely.

16 **A. Statutory Tolling**

17 AEDPA permits statutory tolling of the limitations period when
 18 a properly filed application, motion or petition for a post-
 19 conviction remedy is pending in state court. 28 U.S.C. § 2244(d)(2)
 20 ("The time during which a properly filed application for State post-
 21 conviction or other collateral review with respect to the pertinent
 22 judgment or claim is pending shall not be counted toward any period
 23 of limitation under this subsection."). A petition is "properly
 24 filed" if its "'delivery and acceptance are in compliance with the
 25 applicable laws and rules governing filings' in that state." *Bonner*
 26 *v. Carey*, 425 F.3d 1145, 1147 (9th Cir. 2005)(quoting *Artuz v.*
 27 *Bennett*, 531 U.S. 4, 8 (2000)).

28 In the absence of undue delay, an application for post-

1 conviction review is considered to be "pending" while the petitioner
2 completes a "full round" of state collateral review. *Delhomme v.*
3 *Ramirez*, 340 F.3d 817, 819 (9th Cir. 2003)(citing *Biggs v. Duncan*,
4 339 F.3d 1045, 1048 (9th Cir. 2003)). A "full round" includes the
5 reasonable intervals between a lower court's denial of a habeas
6 petition and the filing of a subsequent petition at the next state
7 appellate level, known as "gap tolling." *Id.* A round of collateral
8 review is complete when the California Supreme Court's denial of the
9 habeas petition is final. *Id.* at 820 (citing *Carey v. Saffold*, 536
10 U.S. 214, 220 (2002)). At that point, AEDPA's one-year statute of
11 limitations again begins running.

12 Here, Petitioner filed a motion for modification of sentence on
13 May 17, 2007, which was denied on May 29, 2007. Petitioner waited 90
14 days, until August 27, 2007, before filing a habeas corpus petition
15 in the San Bernardino County Superior Court. Petitioner's "full
16 round" of state habeas corpus review, beginning on August 27, 2007,
17 with the superior court habeas corpus petition, ended on February 28,
18 2008, when the California Supreme Court denied her last petition.

19 At the time Petitioner filed her motion for modification, 212
20 days of the 365-day limitations period had passed, leaving 153 days
21 before the statute of limitations expired. The Court will assume,
22 without deciding, that the motion for modification comes within the
23 definition of "post-conviction" review under 28 U.S.C. § 2244(d)(2),
24 and that Petitioner is entitled to statutory tolling for the twelve
25 days during which the motion was pending.

26 However, Petitioner is not entitled to gap tolling for the 90
27 days between the superior court's denial of her motion for
28 modification and the filing of her first state habeas corpus

1 petition, because the motion for modification did not commence the
2 "full round of review," and thus no petition was pending during that
3 time. Moreover, Petitioner would not be entitled to tolling for the
4 90-day gap because the motion and petition were filed in the same
5 court rather than the successive appellate level courts. See *Biggs*,
6 339 F.3d at 1048 (holding that gap tolling is appropriate during the
7 intervals between a lower court decision and the filing of a new
8 application in a higher court); see also *Evans v. Chavis*, 546 U.S.
9 189, 192-93 (2006); *Carey*, 536 U.S. at 223; *Delhomme*, 340 F.3d at
10 821.

11 Petitioner is entitled to statutory tolling for the entire
12 period from August 27, 2007, to February 28, 2008, while she
13 completed one full round of habeas corpus petitions in the California
14 state courts. See *Carey*, 536 U.S. at 222-23. At the completion of
15 this round of petitions, on February 28, 2008, Petitioner still had
16 63 days, until May 1, 2008, to file a timely federal habeas corpus
17 petition.

18 On March 19, 2008, Petitioner submitted her first "Motion to
19 Toll Time for Writ of Habeas Corpus" to this Court. As noted above,
20 this document was not filed by the Court but instead was returned to
21 Petitioner. Even if the Court had accepted the motion for filing, it
22 still was not a valid habeas corpus petition and would not have
23 tolled the statute of limitations.⁵ See *Warren v. Harrison*, 244 Fed.
24 Appx. 831, 832 (9th Cir. 2007). Such a motion seeks relief which the
25 Court could not grant without violating the "case or controversy"

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27 ⁵ It is also well established that tolling is not available for the
time during which a habeas corpus petition is pending in federal court.
28 *Duncan v. Walker*, 533 U.S. at 181-182; *Lott v. Mueller*, 304 F.3d 918,
920 (9th Cir. 2002).

1 requirement of Article III, Section 2 of the United States
 2 Constitution. See *Valley Forge Christian Coll. v. Americans United*
 3 *for Separation of Church and State, Inc.*, 454 U.S. 464, 471 (1982);
 4 *Chairez v. Adams*, 2007 WL 1703750 (N.D. Cal. 2007); *In re Brockett*,
 5 2006 WL 1329675 (N.D. Cal. 2006); see also *United States v. Leon*, 203
 6 F.3d 162, 164 (2d Cir. 2000)(holding that a federal court lacks
 7 jurisdiction to consider the timeliness of a § 2255 petition until
 8 a petition actually is filed).

9 Finally, as discussed above, Petitioner filed a petition for
 10 writ of certiorari in the U.S. Supreme Court on April 28, 2008, which
 11 was denied on October 6, 2008. That Court has explicitly held that
 12 the one-year limitations period for filing a federal habeas corpus
 13 petition is not tolled while a petition for writ of certiorari is
 14 pending. *Lawrence v. Florida*, 549 U.S. 327, 127 S. Ct. 1079, 1082-84
 15 (2007). Accordingly, Petitioner is not entitled to statutory tolling
 16 for the period of time during which her petition for writ of
 17 certiorari was pending in the United States Supreme Court.

18 Even applying all statutory tolling to which Petitioner arguably
 19 may be entitled, the limitations period expired on May 1, 2008. The
 20 petition in this case was not filed until July 29, 2008.⁶ Absent the
 21 benefit of equitable tolling, the petition is untimely.

22 **B. Equitable Tolling**

23 Petitioner's claim of entitlement to equitable tolling is also
 24 without merit. AEDPA's limitations provision is subject to equitable
 25 tolling when "extraordinary circumstances" beyond a prisoner's

27 ⁶ For the reasons stated above, Petitioner's motion to toll time
 28 filed on June 14, 2008, could not be deemed to be a petition for writ
 of habeas corpus. Even if it were, it was still untimely.

control prevented her from filing a petition on time. *Harris v. Carter*, 515 F.3d 1051, 1055-56 (9th Cir. 2008); *Rasberry v. Garcia*, 448 F.3d 1150, 1154 (9th Cir. 2006); *Espinoza-Matthews v. California*, 432 F.3d 1021, 1026 (9th Cir. 2005); see also *Lott v. Mueller*, 304 F.3d 918, 922 (9th Cir. 2002); *Miranda v. Castro*, 292 F.3d 1063, 1066-67 (9th Cir. 2002); *Miles v. Prunty*, 187 F.3d 1104, 1107 (9th Cir. 1999). Thus, in rare and limited circumstances, it is proper for a court to equitably toll AEDPA's statute of limitations. See e.g., *Miles*, 187 F.3d at 1107. Determining whether to apply the equitable tolling doctrine is highly fact specific, and the petitioner "bears the burden of showing that equitable tolling is appropriate." *Espinoza-Matthews*, 432 F.3d at 1026 (quoting *Gaston v. Palmer*, 417 F.3d 1030, 1034 (9th Cir. 2005)). Furthermore, the petitioner must demonstrate that she exercised "reasonable diligence" in attempting to file a habeas petition after the extraordinary circumstances began, lest the "link of causation between the extraordinary circumstances and the failure to file [be] broken." *Spitsyn v. Moore*, 345 F.3d 796, 802 (9th Cir. 2003) (quoting *Valverde v. Stinson*, 224 F.3d 129, 134 (2d Cir. 2000)).

Petitioner's lack of education, legal knowledge and expertise does not entitle her to equitable tolling. It is well established that a prisoner's educational deficiencies, ignorance of the law, or lack of legal expertise is not an extraordinary circumstance and does not equitably toll the limitations period. See *Rasberry*, 448 F.3d at 1154; *Fisher v. Ramirez-Palmer*, 219 F. Supp. 2d 1076, 1079 (E.D. Cal. 2002); *Eisermann v. Penarosa*, 33 F. Supp. 2d 1269, 1273 (D. Haw. 1999). While there is no question that Petitioner acted diligently and that her untimeliness is the result of a failure to comprehend

1 the arcane requirements of AEDPA, that is insufficient to warrant the
2 application of equitable tolling.

3 Petitioner also has failed to demonstrate that her inability to
4 access the law library during the first 60 days of her incarceration
5 or the overcrowded conditions of the California prison system were
6 extraordinary circumstances that prevented her from filing her
7 petition on time. Notwithstanding those conditions, Petitioner deftly
8 pursued her California state post-conviction remedies. The error that
9 resulted in this untimely filing was made in March 2008, when
10 Petitioner decided to file a petition for writ of *certiorari* with the
11 United States Supreme Court rather than a habeas corpus petition in
12 this Court. The lack of access to the law library during the first
13 60 days of her incarceration in August-October 2006 had no apparent
14 bearing on that decision. Indeed, the *Cunningham* decision, upon which
15 Petitioner bases her claim for relief, was not decided until January
16 22, 2007. Petitioner has not established an entitlement to equitable
17 tolling.

18

19 **III. Conclusion**

20 For the reasons discussed above, the Court finds that the
21 petition in this case was untimely filed and that Petitioner is not
22 entitled to tolling for a period of time that would make this
23 petition timely. It is **ORDERED** that the petition be dismissed with
24 prejudice.

25 Dated: October 8, 2008



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28 Marc L. Goldman
United States Magistrate Judge